IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	
	)	**DEFENSE MOTION TO**
v.	)	**COMPEL DISCOVERY #2**
	)	
MANNING, Bradley E., PFC	)	
U.S. Army, (b) (6)	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	10 May 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. In accordance with the Rules for Courts Martial (R.C.M.) 701(a)(2), 701(a)(5), 701(a)(6) and 905(b)(4), Manual for Courts-Martial (M.C.M.), United States, 2008; Article 46, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 846; and the Fifth and Sixth Amendments to the United States Constitution, the Defense respectfully requests that the Court compel the requested discovery. Specifically, the Defense requests that the Court order:

a) Full investigative files by CID, DIA, DISA, and CENTCOM/SOUTHCOM related to PFC Manning, WikiLeaks, and/or the damage occasioned by the alleged leaks be produced to the Defense under R.C.M. 701(a)(2). Further, that the HQDA file related to the 17 April 2012 request be produced under R.C.M. 701(a)(2) and 701(a)(6).

b) FBI, DSS, DOS, DOJ, Government Agency, ODNI, and ONCIX files in relation to PFC Manning and/or Wikileaks be produced to the Defense, or alternatively, that they be produced for *in camera* review to determine whether the evidence is discoverable under R.C.M. 701(a)(2) as being material to the preparation of the defense. If the Court concludes that the files of the above agencies are not within the possession, custody, or control of military authorities, the Defense still requests that the Court order production of the entire file under the "relevant and necessary" standard under R.C.M. 703(f);

c) The Government state with specificity the steps it has taken to comply with its requirements under R.C.M. 701(a)(6);

d) The Government produce *Brady* materials from certain identified agencies;

e) The Government produce all evidence intended for use in the prosecution case-in-chief at trial obtained from DIA, DISA, CENTCOM/SOUTHCOM, FBI, DSS, DOS, DOJ, Government Agency, ODNI, ONCIX and any aggravation evidence that it intends to introduce during sentencing from the above named organizations.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2)(A). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

EVIDENCE

3. The Defense does not request any witnesses be produced for this motion.[1] The Defense requests that this Court consider the following evidence in support of this motion:

a. Appellate Exhibits VIII, XXVI, XXXI, XXXVI, XLIX, XLVIII, and LXVIII
b. Unofficial Transcript, 23 February 2012
c. Attachment A (Department of the Army Memorandum dated 17 April 2012)
d. Attachment B (Email from Ashden Fein, 17 April 2012)

FACTS

4. The following facts are based upon the Government's concessions in Appellate Exhibit XLIX and the Court's Ruling in Appellate Exhibit XXXVI and Appellate Exhibit LXVIII. There are four types of entities involved in this case that are relevant for the purpose of this motion: 1) Military organizations/entities; 2) Entities that participated in a joint investigation; 3) Other "closely aligned" agencies; and 4) Unrelated law enforcement agencies which were specifically identified by the Defense.

a) Military Organizations/Entities

Army Criminal Investigation Command (CID). The primary law enforcement organization within the Department of the Army focused on investigating the accused.

Defense Intelligence Agency (DIA). An intelligence agency within the DOD which operated the Information Review Task Force (IRTF), a DOD directed organization that was responsible for conducting a comprehensive DOD review of classified documents posted to the WikiLeaks website and any other associated materials.

Defense Information Systems Agency (DISA)

United States Central Command (CENTCOM) and United States Southern Command (SOUTHCOM)

b) Joint Investigations

[1] The Defense requests the testimony of Ambassador Patrick Kennedy for the purposes of this motion if the Government maintains that the damage assessment items listed for the DOS within paragraph 16, *infra*, do not exist.

FBI. The primary law enforcement organization within the DOJ, focused on investigating matters related to the accused.

Diplomatic Security Service (DSS). The primary law enforcement organization within the Department of State (DOS), focused on investigating matters related to the DOS.

c) Closely Aligned Organizations

Department of State. The accused is charged with compromising the DOS's documents and the Government intends to use additional information from the Department during its case-in-chief.

DOJ. The Government collaborated with the federal prosecutors within the DOJ during the accused's investigation.

Government Agency. The accused is charged with compromising Government Agency's documents and the Government intends to use additional information from the Agency during its case-in-chief.

Office of the Director of National Intelligence (ODNI). The Government intends to use information from this Department during its case-in-chief.

ONCIX. The Court found in its ruling that ONCIX was a closely aligned agency. *See* Appellate Exhibit XXXVI at 11, paras. 4, 8.

d) Unrelated Law Enforcement Files Specifically Identified by the Defense

Interagency Committee Review. The results of any investigation or review concerning the alleged leaks in this case by Mr. Russell Travers, National Security Staff's Senior Advisor for Information Access and Security Policy. Mr. Travers was tasked to lead a comprehensive effort to review the alleged leaks in this case. *See* Defense Discovery Request Dated 8 December 2010 and 13 October 2011 within Appellate Exhibit VIII;

President's Intelligence Advisory Board. Any report or recommendation concerning the alleged leaks in this case by Chairman Chuck Hagel or any other member of the Intelligence Advisory Board. *See* Defense Discovery Request Dated 13 October 2011 within Appellate Exhibit VIII;

House of Representatives Oversight Committee. The results of any inquiry and testimony taken by House of Representative Oversight Committee led by Representative Darrell Issa. The committee considered the alleged leaks in this case, the actions of Attorney General Eric Holder, and the investigation of PFC Bradley Manning. *See* Defense Discovery Request Dated 10 January 2011 and 13 October 2011 within Appellate Exhibit VIII .

ARGUMENT

A. Information That the Government Does Not Dispute is Under Military Control

5. The Government agrees that information in the possession, custody, and control of CID, DIA, DISA, and CENTCOM and SOUTHCOM falls within R.C.M. 701(a)(2). While the Government has turned over some of this material, and is in the process of turning over the Information Review Task Force Report, the Defense renews its previous discovery requests for the entire files from these organizations related to PFC Manning, WikiLeaks, and/or the damage occasioned by the alleged leaks (to include any document, report, analysis, file, investigation, letter, working paper, damage assessment (or anything that can be reasonably construed as falling within the aforementioned)).

6. In its Ruling on 23 March 2012 (Appellate Exhibit XXXI), the Court ordered the Government to report on whether DIA (among others) had any "investigative files relevant to this case." The Government responded on 20 April 2012 that DIA did not have any investigative files relevant to this case. This was surprising to the Defense given that the 12 pages of *Brady* material that the Government had provided a week earlier revealed that the DIA did have what the Defense would consider "an investigation" into the alleged leaks.

7. Apparently, the Court and the Government took a much more narrow view of "investigation" than the Defense intended. It seems that the Government thought that the Defense was seeking only discovery of a formal investigation into the leaks (and perhaps files labeled as "Investigation"). The Defense did not intend in its discovery request for only formal investigations to be turned over to the Defense. Indeed, it has always requested broad discovery of all documents related to PFC Manning, WikiLeaks, and/or the damage occasioned by the alleged leaks.[2]

8. For the sake of clarity, the Defense requests that, to the extent that they have not yet been produced, the entire CID, DIA, DISA, and CENTCOM and SOUTHCOM files related to PFC Manning, WikiLeaks, and/or the damage occasioned by the alleged leaks be produced to the Defense. These files would include, but not be limited to, documents, reports, analyses, files, investigations, letters, working papers, and damage assessments (or anything that can be reasonably construed as falling within the aforementioned). These documents do not need to be formal investigative files in order to be in the purview of what the Defense requests. These documents are material to the preparation of the Defense as they will show what, if any, damage was caused by the alleged leaks which will help the Defense prepare both for the merits and sentencing, if necessary.

B. Joint Investigations and Closely Aligned Agencies

[2] For the purpose of this motion and subsequent motions, "damage" occasioned by the alleged leaks should be read broadly to include any mitigation efforts to correct such damage.

9. The Government acknowledges that the FBI and DSS participated in a joint investigation of this case. It also acknowledges that the DOS, DOJ, Government Agency, and ODNI are closely aligned with the Government in this case. The Court found that ONCIX was also closely aligned with the Government in this case. Where the requested discovery is in the possession of an entity that conducted a joint investigation or an entity that is closely aligned with the prosecution, the discovery is deemed to be in the "possession, custody, or control of military authorities" within the meaning of R.C.M. 701(a)(2).

10. R.C.M. 701(a)(2)(A) provides that, upon request of the Defense, the Government shall permit the Defense to inspect:

> Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, *which are within the possession, custody, or control of military authorities*, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused.

(emphasis supplied). The Government has previously maintained that because the FBI and the DOJ are organizations not subject to a military command, then the requested materials are not within the possession, custody, or control of military authorities. *See* Appellate Exhibit XLIX.

11. As argued previously, the rule does not speak to whether other *organizations* such as the DOS, FBI, DOJ, ONCIX, ODNI, DSS, or Government Agency are under military control. Rather, it speaks to whether the books, papers, documents, etc. are within the "possession, custody or control" of military authorities. Whether a document is in the "possession, custody, or control" of military authorities is a legal question, not a factual one. *See United States v. Santiago*, 46 F.3d 885, 893 (9th Cir. 1995) ("[T]his issue involves a legal determination of the meaning of 'in the possession of the government[.]'"). Although the issue of what items are legally considered to be in the "possession, custody or control" of military authorities appears to be a question of first impression in military courts, it has frequently arisen in federal courts. *See* Fed. R. Crim. P. 16 (the federal court equivalent to R.C.M. 701(a)(2)); *see also United States v. Stone*, 40 M.J. 420, 422 n.1 (C.M.A. 1994) (when discussing R.C.M. 701(a)(2), noting that "a similar right to discovery [is] provided in Fed. R. Crim. P. 16"); Drafter's Analysis, *Manual for Courts–Martial, Rule 701 Discovery* ("(a) Disclosure by the trial counsel. This subsection is based in part on Fed. R. Crim. P. 16(a), but it provides for additional matters to be provided to the defense . . . . [R.C.M. 701(a)(2)] parallels [then-]Fed. R. Crim. P. 16(a)(1)(C) and (D) [now Fed. R. Crim. P. 16 (a)(1)(E)]").

12. The language of Fed. R. Crim. P. 16 and R.C.M. 701(a)(2) is nearly identical, except that the federal rules use the term "government" instead of "military authorities."[3] The term

[3] Rule 16(a)(1)(E) reads as follows:

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is *within the government's possession, custody,*

"government" under Rule 16 is synonymous with "prosecution" or "trial counsel." *See United States v. Brazel*, 102 F.3d 1120, 1150 (11th Cir. 1997) ("Binding precedent has construed the term government in Rule 16(a)(1) to refer to the defendant's adversary, the prosecution, given the repeated references to the attorney for the government in 16(a)(1)(A), (B) and (D) and 16(a)(2), and language in [then-]16(a)(1)(C) referring to papers and documents intended for use by the government as evidence in chief at the trial." (internal quotations omitted)). Although the military rule parallels Fed. R. Crim. P. 16(a)(1)(E), R.C.M. 701(a)(2) is intended to be broader than its federal counterpart, in that it requires that the Government turn over not only evidence which is within trial counsel's control, but *also* in the control of military authorities generally.[4]

13. The key under both of these rules is determining when a given item is considered to be within a prosecutor's "possession, custody, or control." Since military courts have not addressed this issue directly, federal court precedent is instructive in determining how the phrase "possession, custody, or control" under R.C.M. 701(a)(2) should be interpreted.

14. The Defense incorporates its analysis of federal precedent to interpret "possession, custody, or control" from Appellate Exhibit XLVIII. It is clear that under federal law, a prosecutor cannot evade his discovery obligations under the federal equivalent to R.C.M. 701(a)(2) simply by saying that the requested information is not in the possession, custody or control of the government. Instead, the prosecutor is required to either turn over material which: i) he has access to or knowledge of; or ii) is held by agencies that participated in a joint investigation of the accused or by agencies that are closely aligned with the prosecution.

15. R.C.M. 701(a)(2) must be interpreted to include information that is technically in the hands of a joint investigative agency or any other closely aligned agency. Otherwise, the trial counsel would "be allowed to avoid disclosure of evidence by . . . leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial; such evidence is plainly within his Rule 16 'control.'" *United States v. Trevino*, 556 F.2d 1265, 1272 (5th Cir. 1977). If R.C.M. 701(a)(2) were not interpreted in line with federal case law, all an Army prosecutor would need to do to evade his R.C.M. 701(a)(2) discovery obligations would be to involve aligned or cooperating agencies in the case and then ensure that these agencies kept the evidence that the prosecutors did not want disclosed in its entirety.[5] *United States v. Poindexter*, 727 F. Supp. 1470, 1478 (D.D.C. 1989) ("[S]everal courts have noted that a prosecutor who has had access to documents in other agencies in the course of his investigation cannot avoid his discovery obligations by selectively leaving the materials with the agency once

---

or control and:

(i) the item is material to preparing the defense;
(ii) the government intends to use the item in its case-in-chief at trial; or
(iii) the item was obtained from or belongs to the defendant.

Fed. R. Crim. P. 16(a)(1)(E) (emphasis supplied).

[4] To avoid confusion, it is helpful to read R.C.M. 701(a)(2) as referring to matters within the possession, custody, or control of either trial counsel or military authorities. In this way, it parallels Rule 16, except that it allows for more generous disclosure, in that it includes items within military control as well.

[5] The Defense recognizes, of course, that the Government would still have an obligation under *Brady* to produce favorable evidence.

he has reviewed them."). This does not comport with the spirit of R.C.M. 701(a)(2), nor the letter of Rule 701(a)(2), properly construed. *See also* Article 46, UCMJ ("The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.").[6]

16. Under R.C.M. 701(a)(2), the Court should conclude that the below-requested discovery by the Defense is within the "possession, custody, or control" of the Government and compel the Government to produce the requested discovery from those agencies that participated in a joint investigation or are closely aligned. If any such agency does not voluntarily provide the requested information, the Court should order production of the requested information under R.C.M. 703(f)(4)(B). The use of R.C.M. 703(f)(4)(B) recognizes that although not factually within the "possession, custody, or control" of the Government, the items are legally within the "possession, custody, or control" of the Government. *See* Appellate Exhibit LXVIII ("[T]he fact that information controlled by another agency is discoverable under RCM 701 may make such information relevant and necessary under RCM 703 for discovery.").

a) **FBI**. The Government has produced what it has characterized as "at least *Brady*" material from the FBI file. The Government has submitted heavily redacted FBI files to the Defense. As the Court has already concluded, the requirements for discovery and production of the evidence are the same for classified and unclassified information. The only exception is when the Government moves for limited disclosure under M.R.E. 505(g)(2) or claims the M.R.E. 505 privilege for classified information. In the instant case, the Government has not moved for a limited disclosure nor has it asserted the privilege on behalf of the FBI. As such, the Government cannot submit to the Defense a redacted version of the FBI file when such a file is within its possession, custody or control.[7] The Government's belief that it can unilaterally redact information stems from its erroneous understanding of classified discovery. In the Government's motion argument the following was stated in response to the Court's question:

---

[6] R.C.M. 701(a)(2) must be read consistently with federal case law to include documents that are maintained or held by agencies that are jointly investigating the accused or agencies that are closely aligned with the prosecution. If it were not so read, then defendants in federal cases would benefit from much broader discovery rights than their military counterparts, as those defendants would have access under Rule 16(a)(1)(E) to documents of agencies involved in joint investigations or agencies that are closely aligned with the prosecution, while military accuseds would not. This, in turn, could not be reconciled with the repeated statements of military courts that military discovery is much broader than that available in civilian courts. *See United States v. Guthrie*, 53 M.J. 103, 105 (C.A.A.F. 2000) ("Discovery in military practice is open, broad, liberal, and generous."); *United States v. Simmons*, 38 M.J. 376, 380 (C.M.A. 1993) ("Congress intended more generous discovery to be available for military accused." (emphasis omitted)); *United States v. Hart*, 29 M.J. 407, 410 (C.M.A. 1990) ("[D]iscovery available to the accused in courts-martial is broader than the discovery rights granted to most civilian defendants."); *United States v. Killebrew*, 9 M.J. 154, 159 (C.M.A. 1980) ("Military law has long been more liberal than its civilian counterpart in disclosing the government's case to the accused and in granting discovery rights."); *United States v. Adens*, 56 M.J. 724, 731 (A. Ct. Crim. App. 2002) ("The military criminal justice system contains much broader rights of discovery than is available under the Constitution or in most civilian jurisdictions.").

[7] Then-CPT Fein also stated in oral argument, "And we have been working with the Federal Bureau of Investigation to turn over any material that would be pertaining to the accused. But because that information is classified that requires the procedures under M.R.E. 505." *See* Unofficial Transcript from Motions Argument 23 February 2012, at 158. This quote recognizes that the Government has represented that it would turn over "any material" related to the accused (not only *Brady* material). This is a very strong indicator that this material is in the possession, custody and control of the Government.

MJ: I guess that is where I am going. How does M.R.E. 505 protect disclosure of classified information if the privilege is not invoked?

TC: Yes, ma'am. Because it gives the government the option to voluntarily--like--as Mr. Coombs pointed out, to voluntarily disclose information. *To disclose information with redactions [and] substitutions and if the defense doesn't have an issue with*, it doesn't require a court to make a ruling. And it goes all the way to the other extreme of the government invoking the privilege whole cloth and then as it is contemplated in the ah--excuse me, in the 'in-camera' review under M.R.E. 505(i), that if its--if there is an unjust result by which withholding, that the Court could then sanction the prosecution and the government.

[Unofficial Transcript from Motions Argument 23 February 2012, p. 157]

The Court has ruled that in order for M.R.E. 505 to apply, the Government must invoke a privilege. It cannot skip over the invocation of the privilege and go straight to unilateral redactions and substitutions. Accordingly, the Defense moves to compel disclosure of the full FBI file as it pertains to the accused, WikiLeaks and/or the alleged leaks. If the Government wishes to make redactions, it must follow the proper procedure under M.R.E. 505 for doing so.

b) **Diplomatic Security Service (DSS).** The Government has turned over limited files from its joint investigation with DSS. The discovery provided deals only with the item charged in Specification 14 of Charge II. The Government has not turned over any DSS files or investigation dealing with Specifications 12 or 13 of Charge II. The Defense moves for the full DSS file as it pertains to the accused, WikiLeaks and/or the alleged leaks.

c) **Department of State.** The Government has provided the Court what is has stated is the only document that addresses the ongoing DOS damage assessment and review (what the Government refers to as "the damage assessment"). The Government has not provided, to the Defense's knowledge, any documents related to the following:

(1) The Chiefs of Mission review of the released cables at affected posts discussing their initial assessment, as well as their opinion regarding the overall effect that the WikiLeaks release could have on relations within their host country, if any;

(2) The WikiLeaks Working Group composed of senior officials throughout the Department that was created to review potential risks to individuals from the release of cables by WikiLeaks, if any;

(3) The "Mitigation Team" created by the Department of State to address the policy, legal, security, counterintelligence, and information assurance issues presented by the release of the documents to WikiLeaks, if any; AND

(4) The Department's reporting to Congress concerning any effect caused by the WikiLeaks' disclosure and the steps undertaken to mitigate them, if any. The Department convened two separate briefings for members of both the House of Representatives and the Senate in December of 2010. The Department also appeared

twice before the House Permanent Select Committee on Intelligence on 7 and 9 December 2010.

The Defense moves for each of these specifically-requested items, as well as any other documents related to the accused, WikiLeaks and/or the alleged leaks.[8]

d) **DOJ.** The Government collaborated with the federal prosecutors within the DOJ during the accused's investigation. The Government has not turned over any substantive material related to this investigation from the DOJ. The Defense moves for any documents from the DOJ related to the accused, WikiLeaks and/or the alleged leaks.

e) **Government Agency.** The accused is charged with compromising Government Agency's documents and the Government intends to use additional information from the Agency during its case-in-chief. The Government has yet to produce any internal investigation (to include working papers and other internal documents, reports or files) or damage assessment from this agency. The Defense moves for any documents from Government Agency related to the accused, WikiLeaks and/or the alleged leaks.

f) **Office of the Director of National Intelligence (ODNI)**. The Government intends to use information from this Department during its case-in-chief. Yet, the Government has not turned over any documents by ODNI. The letter to ODNI from the Assistant General Counsel of the Federal Trade Commission regarding the "documents that were compromised in the Department of State's Net-Centric Diplomacy database" clearly shows that ODNI has conducted some sort of internal review of the cables. *See* Attachment to Appellate Exhibit XXXI. The Defense moves for any documents from ODNI related to the accused, WikiLeaks and/or the alleged leaks.

g) **ONCIX.** The Government has claimed this agency does not have any forensic reports, investigation, or damage assessment. However, the 12 pages of *Brady* material produced to the Defense clearly indicates that ONCIX has material responsive to the Defense's request under R.C.M. 701(a)(2). *See id.* As such, the Defense moves for any documents from ONCIX related to the accused, WikiLeaks and/or the alleged leaks.

17. The Court should conclude that the files from the above listed agencies are within the possession, custody, or control of the Government under R.C.M. 701(a)(2) and order that all the requested documents be produced to the Defense.

C. The Government's *Brady* Search

18. The Government has a due diligence duty to search for evidence that is favorable to the defense and material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); R.C.M. 701(a)(6). The trial counsel's due diligence duty applies to: "(1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offense;

[8] Again, to avoid any confusion, the Defense is requesting any document, report, analysis, file, investigation, letter, working paper, damage assessment (or anything that can be reasonably construed as falling within the aforementioned)) related to the accused, WikiLeaks and/or the damage occasioned by the leaks. If the Government maintains that such documents do not exist, the Defense requests Ambassador Patrick Kennedy be required to testify regarding the above information.

(2) investigative files in a related case maintained by an entity closely aligned with the prosecution; and (3) other files, as designated in a defense discovery request, that involved a specified type of information within a specified entity." *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999) (internal quotations and citations omitted).

19. "For relevant files known to be under the control of another governmental entity, Trial Counsel must make the fact known to the Defense and engage in good faith efforts to obtain the material." Appellate Exhibit XXXVI at 8, para. 3. The Defense has requested specific information from within a specified entity in at least the following three instances:

a) **Interagency Committee Review.** The results of any investigation or review concerning the alleged leaks in this case by Mr. Russell Travers, National Security Staff's Senior Advisor for Information Access and Security Policy. Mr. Travers was tasked to lead a comprehensive effort to review the alleged leaks in this case;

b) **President's Intelligence Advisory Board**. Any report or recommendation concerning the alleged leaks in this case by Chairman Chuck Hagel or any other member of the Intelligence Advisory Board; and

c) **House of Representatives Oversight Committee.** The results of any inquiry and testimony taken by House of Representative Oversight Committee led by Representative Darrell Issa. The committee considered the alleged leaks in this case, the actions of Attorney General Eric Holder, and the investigation of PFC Bradley Manning.

See Defense Discovery Request Dated 8 December 2010, 10 January 2011 and 13 October 2011 within Appellate Exhibit VIII.

20. The Government has failed to inform the Defense that the requested files were under the control of another government entity and has also failed to document its good faith efforts to obtain the requested relevant material. The Government should be required to state the steps it has taken to comply with its requirements under R.C.M. 701(a)(6). Specifically, the Government should respond to the following four questions:

a) Has the Government attempted to contact the identified agency to conduct a *Brady* review under R.C.M. 701(a)(6)?

b) When did the Government make its inquiry?

c) How many documents did the Government review?

d) What were the results of the Government's inquiry? In particular, do any of these discovery requests contain *Brady* material?

21. The Defense also requests that the Court order the Government to respond to the above questions not only for these three specific requests, but for <u>all</u> agencies that the Government has

contacted to conduct a review under R.C.M. 701(a)(6) to ensure that it has, in fact, complied with its *Brady* obligations.

22. The Defense to date has received only 12 pages of *Brady* material (and apparently, some *Brady* material may be buried within the FBI file). The Defense believes, based on the 12 pages of *Brady*, that other organizations have similar documents, files, assessments, working papers, reports, etc. that support the Defense's argument that the alleged leaks did little to no damage. The Defense thus requests that the aforementioned questions be answered for each of the 63 relevant agencies, and any other organization that the Government contacted for *Brady* information.[9] At the very least, the Government should be prepared to state, on the record, that its search of the 63 relevant agencies and other organizations it has contacted has not yielded any *Brady* material (i.e. material that is favorable to the accused, in that it reasonably tends to reduce guilt, negate guilt, or *reduce punishment*). In making such a statement, the Government should provide a statement of exactly what it asked for from these agencies.

23. The Defense further requests that the Government provide *Brady* material from the specifically-mentioned agencies and files in Part (A) and (B) of this motion and/or state that it has reviewed the relevant files and that there is no *Brady* information within these files. In particular, the Defense requests that the Government provide *Brady* material from the following files:

a) Files that the Government does not dispute are within military custody, possession and control under R.C.M. 701(a)(2) (i.e. CID, DIA, DISA, and CENTCOM and SOUTHCOM);

b) Files that the Defense believes are within the custody, possession and control of military authorities under R.C.M. 701(a)(2) because such agencies have conducted a joint investigation or are closely aligned with the prosecution. In particular, the Defense requests *Brady* material from the following agencies:

> (1) **FBI**. The Government has produced what it has characterized as "at least *Brady*" material from the FBI file. The Defense requests that the Government specify what it believes is *Brady* material and certify that this is the only *Brady* material contained in the entire FBI file.
>
> (2) **Diplomatic Security Service (DSS).** The Defense requests that the Government produce all *Brady* material from DSS, or certify that such *Brady* material does not exist.
>
> (3) **Department of State.** As indicated, the Government has not provided any documents related to the following:
>
> > (i) The Chiefs of Mission review of the released cables at affected posts discussing their initial assessment, as well as their opinion regarding the

[9] Question A for all other agencies that the Government has contacted to conduct a review under R.C.M. 701(a)(6) should be changed to require a response to "Which specific agencies has the Government contacted to conduct a Brady review under R.C.M. 701(a)(6)?

overall effect that the WikiLeaks release could have on relations within their host country, if any;

(ii) The WikiLeaks Working Group composed of senior officials throughout the Department that was created to review potential risks to individuals from the release of cables by WikiLeaks, if any;

(iii) The "Mitigation Team" created by the Department of State to address the policy, legal, security, counterintelligence, and information assurance issues presented by the release of the documents to WikiLeaks, if any; AND

(iv) The Department's reporting to Congress concerning any effect caused by the WikiLeaks' disclosure and the steps undertaken to mitigate them, if any. The Department convened two separate briefings for members of both the House of Representatives and the Senate in December of 2010. The Department also appeared twice before the House Permanent Select Committee on Intelligence on 7 and 9 December 2010.

The Defense requests that the Government produce *Brady* material from each of these specifically-requested items as well as *Brady* material from the entire DOS file related to the accused, WikiLeaks and/or the alleged leaks, or certify that such *Brady* material does not exist.

(4) **DOJ.** The Defense requests that the Government produce all *Brady* material from the DOJ, or certify that such *Brady* material does not exist.

(5) **Government Agency.** The Defense requests that the Government produce all *Brady* material from Government Agency, or certify that such *Brady* material does not exist.

(6) **Office of the Director of National Intelligence (ODNI)**. The Defense has already received some *Brady* material related to ODNI. The Defense requests that the Government produce all *Brady* material from ODNI, or certify that such *Brady* material does not exist.

(7) **ONCIX.** The Defense has already received some *Brady* material related to ONCIX. The Defense requests that the Government produce all *Brady* material from ONCIX, or certify that such *Brady* material does not exist.

24. In summation, the Defense requests:

a) *Brady* material from the Interagency Committee Review; the President's Intelligence Advisory Board; the House of Representatives Oversight Committee;

b) *Brady* material from files that the Government does not dispute are within military custody, possession and control under R.C.M. 701(a)(2) (i.e. CID, DIA, DISA, CENTCOM and SOUTHCOM) and *Brady* material responsive to the 17 April 2012 HQDA Memo (discussed below).

c) *Brady* material from files that the Defense believes are within the custody, possession and control of military authorities under R.C.M. 701(a)(2) because such agencies have conducted a joint investigation or are closely aligned with the prosecution (i.e. FBI, DSS, DOS, DOJ, Government Agency, ODNI, ONCIX);

d) That the Government respond to the following four questions in respect to each of the aforementioned requests:

(1) Has the Government attempted to contact the identified agency to conduct a *Brady* review under R.C.M. 701(a)(6)?

(2) When did the Government make its inquiry?

(3) How many documents did the Government review?

(4) What were the results of the Government's inquiry? In particular, do any of these discovery requests contain *Brady* material?

e) That the Government respond to the following four questions in respect to each of each of the other 63 agencies and other organizations it has contacted in its search for *Brady* material:

(1) Which agencies did the Government contact to conduct a *Brady* review under R.C.M. 701(a)(6)?

(2) When did the Government make its inquiry?

(3) How many documents did the Government review?

(4) What were the results of the Government's inquiry? In particular, do any of these discovery requests contain *Brady* material?

25. The Defense has consistently maintained – and continues to maintain – that the Government has not understood its *Brady* obligations. The Defense also believes that, to the extent that the Government is conducting a *Brady* search, it is not doing so in a diligent and timely manner.

26. The Defense has just learned that on 29 July 2011, the Government sent out a memo to Headquarters, Department of the Army requesting it to task Principal Officials to search for, and preserve, any discoverable information.[10] *See* Attachment A (Department of the Army Memorandum dated 17 April 2012). According to a 17 April 2012 Memorandum for Principal Officials of Headquarters, Department of the Army, "[i]t was only recently determined that no action had been taken by HQDA pursuant to the 29 July 11 memo from DOD OGC." *Id.* This memo shows that no action had been taken by HQDA for *nine months* in response to the Government's request for *Brady* and other potentially discoverable material. In other words, the

[10] The Defense also requests that this Court compel production of the HQDA file related to the 17 April 2012 request under R.C.M. 701(a)(2) and 701(a)(6).

Government has not yet completed a *Brady* search of its own files (i.e. files which are clearly in the possession, custody, and control of military authorities) even though two years have elapsed since PFC Manning was arrested. That the Government cannot "get its ducks in a row" with respect to discovery which is clearly under its control does not inspire confidence that the Government has diligently conducted a *Brady* search of other agencies.

27. In fact, there are huge questions and inconsistencies in the Government's statements regarding its search for *Brady* material. *See also* Appellate Exhibits XXVI, XXXI, and XLVIII. For instance, the Defense received 12-pages of *Brady* material several weeks ago, detailing responses by various government agencies that the alleged leaks did little to no damage to those organizations. The Defense was troubled that it was only now receiving such *Brady* material. Based on the nature of that *Brady* material, the Defense believes there is much more similar *Brady* material out there that the Government has not disclosed. The Defense asked the Government why it was only now receiving such material. MAJ Fein's response was as follows:

> Since prior to referral, we have been coordinating with different federal organizations which we have reason to believe prepared an assessment, as a result of our continuing Williams and/or ethical obligations. Those organizations began providing us with these assessments as early as a few weeks ago and as recent as a few days ago. We adopted an efficient method of receiving, reviewing, and, if necessary, obtaining approval for the disclosure of the assessments, so that we can produce the discoverable portions, if any, to the defense as soon as possible. These assessments are the most current.
>
> The prosecution will continue to produce as much information as authorized to mirror open-file discovery, but only pursuant to the authority we receive, based on balancing disclosure with protecting national security.

See Attachment B (Email from Ashden Fein, 17 April 2012).

28. There are several troubling aspects to MAJ Fein's statement.[11] First, MAJ Fein states that although the Government has been coordinating with several different organizations (presumably the 63 organizations the Government has previously referenced), these organizations "began providing us with these assessments as early as a few weeks ago." Apparently, the Government is saying that it took almost two years for organizations to provide the Government with discoverable information. It appears that, with the vast majority of the 63 organizations, the Government has yet to receive (much less disclose) *Brady* information. What is even more problematic is that the Government represented at an earlier 802 session that it had *already* searched the various agencies and that these agencies did not possess any *Brady* material. This makes no sense: either the Government has already searched the agencies and there is no *Brady* material, or the Government has not yet searched the agencies and there may be *Brady* material.

[11] The Defense would point out that in this email, MAJ Fein himself referred to these interim documents four times as "assessments." In light of this, the Government cannot claim it did not understand what the Defense was asking for when it asked for damage assessments or assessments of damage/harm to national security.

29. Second, the Government still seems to believe that it is the arbiter of what should or should not be disclosed in the interests of national security. It states that the prosecution will continue to provide as much information as authorized, "based on balancing disclosure with protecting national security." Given that the email concerned documents which referenced damage from the leaks (or lack thereof), the discoverable material the Government was talking about was *Brady* material. The Defense reads the Government's email as saying that it will conduct a balancing test to determine what *Brady* information is discoverable. As previously argued, it is not the role of the Government to balance the rights of the accused with national security.

30. Third, in response to the Defense's question, "Additionally, some of these assessments are interim assessments. Do you have any follow up assessments? at 6:42 pm on 16 April 2012, the Government replied at 9:47 on 17 April 2012 that "[t]hese assessments are the most current." Given the incredibly short turn-around time on the Government's response, it is hard to believe that the Government actually checked to see if these were the latest assessments. In fact, two things would support the fact that they may not be the most recent assessment of damage. These documents were prepared in November 2010, in the immediate aftermath of the leaks; it is likely that these agencies would also be asked to look into the longer-term impact of the leaks. Further, the Government has repeatedly stated that assessing damage is something that takes place over a period of years, not just at one snapshot of time. It is unlikely that an agency would simply rely on one snapshot in November 2010 to assess the impact of the leaks and then never return again to the issue.

31. The aforementioned is intended to provide concrete examples that the Government is not diligently fulfilling its *Brady* obligations. Regardless of whether the Government's conduct amounts to a discovery violation, this Court has actual knowledge that things are remiss in the Government's *Brady* search. Accordingly, this Court cannot continue to accept on faith that the Government has understood its *Brady* obligations and that it is diligent in fulfilling them. *See United States v. Cerna*, 633 F. Supp. 2d 1053, 1056 (N.D. Cal. 2009) (noting that "[t]he government is fond of saying that it knows its *Brady* obligations and will honor them."); *United States v. Naegele*, 468 F. Supp. 2d 150, 152 n.2 (D.D.C. 2007) ("[N]ow that the Court realizes that its view of *Brady* and the government's have not been consistent for many years, it no longer accepts conclusory assertions by the Department of Justice that it 'understands' its *Brady* obligations and 'will comply' or 'has complied' with them."); *United States v. Lim*, No. 99 CR 689, 2000 WL 782964, at *3 (N.D. Ill. June 15, 2000) ("The government's response – which is and has been its stock response to such motions as long as the Court can recall – is that the government 'recognizes its obligation' to produce material pursuant to *Brady* and *Giglio*, that 'the government will abide by the law,' and that the motion should therefore be denied as 'moot' . . . . [T]his Court does not believe that this is an appropriate way to deal with a matter as important as the government's obligation to produce material that is favorable to an accused."); *United States v. Hsia*, 24 F. Supp. 2d 14, 29 (D.D.C. 1998) ("While the government has represented that it 'understands its *Brady* obligations and it fully intends to abide by them,' the Court shares defense counsel's skepticism." (citation omitted)). The latest memo from HQDA reveals the Government's utter lack of diligence in undertaking its *Brady* search. Why would the Government wait until over a year after preferral of charges to begin its search for *Brady* material? How could the Government not have noticed that for nine months, it had not received any material from any principal officials in the Army? If the Government cannot even search its

own files properly, how can we believe them when they say they have diligently searched the files of other organizations? In order to ensure that the Government has done what it actually claims it is doing, it must provide an accounting for its *Brady* search. If the Government has nothing to hide, then it should not object to providing this Court and the Defense with a comprehensive accounting of its *Brady* search.

D. The Government's Evidence in Merits and Sentencing

32. The Government has a requirement, after service of charges, upon request of the Defense, to permit the Defense to inspect material intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial. R.C.M. 701(a)(2). Additionally, upon request of the Defense, the trial counsel shall permit the Defense to inspect written material that will be presented at the presentencing proceedings. R.C.M. 701(a)(5)(A). The Government has indicated that it intends to use information from at least the DOS, Government Agency, and ODNI. The Defense has previously requested timely access to this information, and the Court indicated that it would not allow the Government to wait until the eve of trial to provide access to the requested information.

33. The trial is currently scheduled to begin on 21 September 2012. The Defense believes that timely access to this information should begin now. The Government has had over two years to cull through the charged information and review documents from the various named agencies. During this time, the Government has been permitted to select which information it believes should be used for merits and which for sentencing. The Defense has not had equal access to this same information, or the ability to factor this information into the defense's theory on the merits or any possible sentencing case. The requested information is material to the preparation of the defense, and should be turned over immediately. To allow the Government to restrict the Defense's access to this information is to provide the Government with an unfair tactical advantage that will likely prejudice PFC Manning's right to a fair trial.

CONCLUSION

34. In accordance with the above, the Defense requests that the Court order that:

a) Full investigative files by CID, DIA, DISA, and CENTCOM/SOUTHCOM related to PFC Manning, WikiLeaks, and/or the damage occasioned by the alleged leaks be produced to the Defense under R.C.M. 701(a)(2). Further, that the HQDA file related to the 17 April 2012 request be produced under R.C.M. 701(a)(2) and 701(a)(6).

b) FBI, DSS, DOS, DOJ, Government Agency, ODNI, and ONCIX files in relation to PFC Manning and/or Wikileaks be produced to the Defense, or alternatively, that they be produced for *in camera* review to determine whether the evidence is discoverable under R.C.M. 701(a)(2) as being material to the preparation of the defense. If the Court concludes that the files of the above agencies are not within the possession, custody or control of military authorities, the Defense still requests that the Court order production of the entire file under the "relevant and necessary" standard under R.C.M. 703;

c) The Government state with specificity the steps it has taken to comply with its requirements under R.C.M. 701(a)(6);

d) The Government produce *Brady* materials from certain identified agencies;

e) The Government produce all evidence intended for use in the prosecution case-in-chief at trial obtained from DIA, DISA, CENTCOM/SOUTHCOM, FBI, DSS, DOS, DOJ, Government Agency, ODNI, ONCIX and any aggravation evidence that it intends to introduce during sentencing from the above named organizations.

Respectfully submitted,

DAVID EDWARD COOMBS
Civilian Defense Counsel